

# Freedom of Information Act

## Key Information for

### National Clinical Audits

#### **What is the Freedom of Information Act (FOIA)?**

The FOIA gives a general right to any person (i.e. a living individual or corporate body), wherever they are located in the world, to access information held by public authorities. There are, however, some procedural limitations and specific exemptions to the general obligation to provide information. On receipt of a request the public authority must confirm or deny that the information requested exists and provide the information, unless an exemption applies.

#### **What is a public authority?**

There is a list of public authorities, some of which are described generically, such as government departments and some specifically by their title, such as the British Library (for more detail please see the following link <http://www.dca.gov.uk/foi/coverage.htm#part6>). At the time of writing, the vast majority of charities are not designated as public authorities. None of the Royal Colleges are public authorities but NHS trusts, primary care trusts and other NHS organisation are included.

#### **What information is covered?**

All information that is held by or on behalf of a public authority is potentially disclosable under FOIA. However, information which the public authority holds on behalf of another person (including corporate bodies) is not covered. Uncollated data will be potentially disclosable (as it is in any case) but if the terms of participation in the audit are that the collated data is held on behalf of the organisation responsible for the audit then it will not be covered.

The information must also already be recorded (this includes electronically) at the time the request is made. There is no obligation to provide information that has not yet been recorded, such as ideas.

#### **What exceptions are likely to be relevant?**

It must not be forgotten that the overall purpose of FOIA is to give the public access to information. However, the extent of the exemptions acknowledge that there are circumstances when it may be appropriate for information to be withheld.

The most relevant exemptions are:

1. Personal Data

Broadly speaking, FOIA does not entitle anyone to obtain personal data about another living individual if they would not be able to get access to such information under the Data Protection Act 1998 (DPA). Such access under the DPA is unlikely unless the individual was aware that his/her personal data might be disclosed in such circumstances. Therefore, to all intents and purposes it is extremely unlikely that audit data that is capable of identifying an individual would be disclosable.

This exemption would also apply if the personal data of a clinician were to be disclosed under an FOIA application.

2. Confidential Information

If disclosure of information obtained from any other person would expose the public authority to a breach of confidence action then it is exempt from disclosure.

3. Information intended for future publication

Information which it is intended for future publication (by the public authority or another person) is exempt if it is reasonable in all the circumstances to withhold the information. However, this exemption only applies if the intention to publish already exists before the application is made for the information. Furthermore, the public interest in maintaining this exemption must outweigh the public interest in disclosure of the information. Public interest here does not mean "what the public might find interesting" but relates to the question of whether there is a legitimate matter for public debate which will be contributed to by the release of the information.

4. It would take too long

If it would take longer than 18 hours for an NHS organisation to undertake certain activities in order to gather the information in order to respond to an application under FOIA then there is no obligation to provide the material. Extensive requests may well trigger this procedural limitation. However, the public authority may, if it wishes, provide the information anyway and guidance indicates that as much information as possible should be provided within the limit. Public authorities also have a legal duty to provide advice and assistance to an applicant to help them gain access to the information they seek. Please see the Code of Practice for more information on this topic at <http://www.dca.gov.uk/foi/codepafunc.htm>.

There are other exemptions which may apply and each application has to be considered on its facts.

### **What are the risks?**

NHS bodies which collate information for audits and hold it on their own behalf will be subject to FOIA if an application is made. Information held by or on behalf of the Royal Colleges will not as these bodies are not public authorities.

If information is not provided the FOIA does not give an individual applicant a right to commence and direct legal action against a public authority or an employee of such an authority. The steps to be taken are first, a complaint to the public authority and secondly, if that is not satisfactory a complaint can be made to the Information Commissioner (<http://www.informationcommissioner.gov.uk>) for a determination of whether the public authority has complied with its obligations. The Information Commissioner can issue notices to require compliance with FOIA. Either party can appeal to the Information Tribunal (<http://www.informationtribunal.gov.uk/index.html>) from a decision of the Information Commissioner.

### **Whose decision is it to disclose information?**

The legal responsibility to decide on whether exemptions apply and to provide information to an applicant rests with the public authority. If they fail to take into account the rights of third parties, such as those covered by confidentiality or in relation to personal data then they are exposed to possible legal action for a breach of those rights. Even where a third party's rights may be affected the Code of Practice requires the public authority to consult with the person who may be affected by the disclosure.

In the event that a request for information is received, this must be notified to the relevant person at the public authority immediately as the general timescale for a response is tight at 20 working days. In relation to audit data it is anticipated that the relevant Royal College should also be contacted at the same time.

This document and the information is by its nature a general guide only and for information. In the event of an application under FOIA the specific facts must be considered and appropriate advice taken from a suitable specialist.

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